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Azmi Khalili bin Khalid v Sulastri bt Mohd Hossein Enas

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HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO 24NCVC-856–06 OF 2014
SM KOMATHY JC
27 OCTOBER 2014

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Land Law — Vacant possession — Claim for — Property purchased through public auction — Court issued 16F confirming property had been sold to purchaser and full purchase price had been paid — Application to set aside claim for possession

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The plaintiff purchased a property at a public auction for RM5,250,000. The auction was held pursuant to a order for sale obtained by Mystique Bay Sdn Bhd ('MBSB'), a debt collection agency that had bought the defendant's non-performing loan from Standard Chartered Bank. The court issued Borang 16F confirming that the property had been sold to the plaintiff and that the full purchase price had been paid by him. The plaintiff then registered Borang 16F with the land office. This was done and he then became the new registered owner and informed the defendant of the same. The plaintiff was asked to deliver vacant possession and subsequently, the plaintiff surveyed the house. The plaintiff was informed that the defendant was no longer in occupation of the property and that it was vacant. The plaintiff filed an originating summons seeking for an order for vacant possession. The application was served on both the defendant and the official assignee and the matter was fixed for hearing. The defendant's husband who was present sought an adjournment informed the court that the defendant had already vacated the premises and that the property had been vacant for some time. The defendant subsequently commenced an action by originating summons in the High Court to set aside the order for sale made. However, the action was subsequently withdrawn by her. The defendant then filed the present application to set aside the order for possession.

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Held, dismissing the application:

(1) The court issued Borang 16F to the plaintiff and the plaintiff became the registered owner of the property after the Borang 16F was registered at the land office. The court officer under whose direction a public auction takes place, is required to issue a certificate called Borang 16F to a purchaser upon receiving the full payment. The issuance of Borang 16F to the plaintiff under s 259(3) rendered the defendant's argument that the plaintiff had breached the conditions in the proclamation of sale

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untenable. It is improbable that the court would have issued Borang 16F to the plaintiff if he had failed to pay monies into court in accordance with the proclamation of sale. The defendant's complaints were therefore without merit (see paras 10–11).

(2) The failure of MBSB as the chargee to apply the monies in accordance with s 268 did not confer on the defendant a cause of action against the plaintiff. The plaintiff was an innocent purchaser. The defendant was precluded from challenging the validity of the Borang 16F and the distribution of the proceeds of sale in these proceedings. Her remedy to recover the surplus monies laid against MBSB, and not the plaintiff (see paras 14–15).

[Bahasa Malaysia summary

Plaintif membeli hartanah di lelongan awam sejumlah RM5,250,000. Lelongan tersebut diadakan berikutan perintah jualan yang diperolehi oleh Mystique Bay Sdn Bhd ('MBSB'), agensi pengutipan hutang yang telah membeli pinjaman tidak berbayar daripada Standard Chartered Bank. Mahkamah mengeluarkan Borang 16F mengesahkan bahawa hartanah telah dijual kepada plaintif dan bayaran belian penuh telah dibayar olehnya. Plaintif kemudiannya mendaftar Borang 16F dengan pejabat tanah. Ini dilakukan dan plaintif yang kemudiannya menjadi pemilik berdaftar baru dan memberitahu defendan mengenainya. Plaintif diminta untuk memberikan milikan kosong dan kemudiannya, plaintif meninjau rumah tersebut. Plaintif diberitahu bahawa defendan bukan lagi penghuni hartanah dan ia adalah kosong. Plaintif memfailkan saman pemula memohon untuk perintah milikan kosong. Permohonan diserahkan ke atas kedua-dua defendan dan pegawai penerima dan perkara ditetapkan untuk pendengaran. Suami defendan yang hadir memohon untuk penangguhan memberitahu mahkamah bahawa defendan telah keluar dari premis tersebut dan hartanah telah kosong untuk beberapa waktu. Defendan kemudiannya memulakan tindakan dengan saman pemula di Mahkamah Tinggi untuk mengetepikan perintah jualan yang dibuat. Walau bagaimanapun, tindakan kemudiannya ditarik balik olehnya. Defendan kemudiannya memfailkan permohonan ini untuk mengetepikan perintah milikan.

Diputuskan, menolak permohonan:

(1) Mahkamah mengeluarkan Borang 16F kepada plaintif dan plaintif menjadi pemilik berdaftar hartanah selepas Borang 16F didaftar di pejabat tanah. Pegawai mahkamah yang memberi arahan lelongan awam untuk dijalankan, dikehendaki untuk mengeluarkan sijil yang dikenali Borang 16F kepada pembeli selepas menerima bayaran penuh. Pengeluaran Borang 16F kepada plaintif di bawah s 259(3) membuatkan hujahan defendan yang plaintif telah memungkiri syarat-syarat dalam perisytiharan jualan tidak dapat dipertahankan. Ia adalah mustahil yang

mahkamah akan mengeluarkan Borang 16F kepada plaintif jika dia gagal untuk membayar wang kepada mahkamah mengikut periystiharan jualan. Aduan defendan oleh itu tanpa merit (lihat perenggan 10–11).

(2) Kegagalan MBSB sebagai pemegang gadaian untuk menguna pakai wang tersebut mengikut s 268 tidak memberikan kepada defendan kausa tindakan terhadap plaintif. Plaintif adalah pembeli yang tidak bersalah. Defendan dikecualikan daripada mencabar kesahan Borang 16F dan pembahagian keuntungan jualan dalam prosiding ini. Remedi untuk mendapatkan semula wang lebihan ditanggung oleh MBSB, dan bukan plaintif (lihat perenggan 14–15).]]

Notes

For cases on claim for vacant possession, see 8 *Mallal's Digest* (5th Ed, 2015) paras 5822–5827.

Legislation referred to

National Land Code ss 268, 259(3), 269(1), Form 16F

Wong Shuet Ping (Chung, Huang & Khalid) for the plaintiff.
Jennifer Thomas (Jennifer Thomas & Co) for the defendant.

SM Komathy JC:

[1] By notice of application dated 16 July 2014, the defendant, a bankrupt, applied to set aside an order made against her requiring her to deliver vacant possession of a property to the plaintiff. The plaintiff had purchased the said property, which belonged to the defendant, at a public auction in 2013.

BACKGROUND FACTS

[2] The facts giving rise to this application are briefly these. The plaintiff purchased a property with the postal address No 14, Lorong Setiarasa, Damansara Heights, 50490 Kuala Lumpur ('the property') at an public auction held in court on 28 May 2013 for RM5,250,000. The auction was held pursuant to a order for sale obtained on 4 August 2009 by Mystique Bay Sdn Bhd ('MBSB'), a debt collection agency that had bought the defendant's non-performing loan from Standard Chartered Bank on 28 May 2013.

[3] On 24 October 2013, the court issued Borang 16F confirming that the property had been sold to the plaintiff and that the full purchase price had been paid by him. The plaintiff then instructed his solicitors, Messrs Chung, Huang & Khalid to register Borang 16F with the land office. This was done and he then became the new registered owner.

[4] By letter dated 18 February 2014, the plaintiff solicitors issued a notice to the defendant to inform her that he had purchased the property at a public auction and had become the new registered owner. The plaintiff was asked to deliver vacant possession by 25 February 2014. Thereupon, the plaintiff appointed a firm called prosperity services to do a survey on the house. The plaintiff was informed that the plaintiff was no longer in occupation of the property and that it was vacant.

[5] On 11 June 2014, the plaintiff filed an originating summons to seek for an order for vacant possession. The application was served on both the defendant and the official assignee and the matter was fixed for hearing on 7 July 2014. On that date, neither the defendant nor the official assignee was present. The defendant's husband who was present sought an adjournment to obtain sanction from the official assignee's office to appoint a lawyer to set aside the foreclosure order and to challenge the manner in which the chargee had distributed the proceeds of sale. He further informed the court that the defendant has already vacated the premises and that the property has been vacant for some time. Whereupon, I granted the order sought by the plaintiff in the originating summons.

[6] The defendant subsequently commenced an action by originating summons in the Kuala Lumpur High Court to set aside the order for sale made on 4 August 2009. However, the action was subsequently withdrawn by her.

[7] The defendant then filed the present application to set aside the order for possession. The affidavit in support was affirmed by the defendant's solicitor Miss Charlotte Jennifer Thomas ('Miss Thomas'). Miss Thomas deposed in her affidavit that the defendant intended to rely on five special circumstances to set aside the order for possession. They were:

(a) defendan masih belum mendapat bayaran surplus dari harga jualan hartanahnya;

(b) pada hari perintah diberi, 7 Julai 2014, defendan tiada locus standi dan tidak diberi peluang untuk membela diri dan kegagalan pegawai penerima menghadiri mahkamah bermakna semua prosiding berkenaan seharusnya ditangguh;

(c) terdapat keluaran wang yang tidak sah dari bayaran surplus oleh MBSB;

(d) pada hah lelong, plaintif gagal membayar 10% sebagai deposit harga jualan hartanah tersebut; dan

(e) plaintif gagal membayar baki harga beli dalam masa 120 hari dari tarikh lelong.

WHETHER IT IS OPEN TO DEFENDANT TO CHALLENGE THE VALIDITY OF BORANG 16F/ DISTRIBUTION OF SALE PROCEEDS IN THESE PROCEEDINGS?

[8] Miss Thomas argued on behalf of the defendant that the order for possession was invalid as the plaintiff had failed to pay 10% of the purchase price as deposit on the date of the auction in accordance with the conditions attached to the Borang 16F. Additionally, the plaintiff had also failed to pay the balance of the purchase price within 120 days of the date of auction as required by the proclamation of sale.

[9] Miss Thomas further argued that in the alternative, the order for possession should be stayed as the defendant is yet to receive the surplus monies from the proceeds of sale. It was said that in law a chargee is required to return to a chargor any surplus monies that remains after the statutory deductions permitted under s 268 of the National Land Code ('the NLC') have been made. The chargee, in the present instance, it was argued, has failed to do comply with s 268.

[10] I deal first with the defendant's complaint that the plaintiff is not entitled to possession as he did not comply with the conditions stated in the proclamation of sale. It is common ground that the court issued Borang 16F to the plaintiff. And that the plaintiff became the registered owner of the property after the Borang 16F was registered at the land office. The court officer under whose direction a public auction takes place, is required to issue a certificate called Borang 16F to a purchaser upon receiving the full payment. The issuance of Borang 16F is dealt with in s 259(3) of the NLC which provides:

> (3) The purchaser at the sale shall, upon payment to the said officer of the full amount of the purchase price, be entitled to receive from him:
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> (a) a certificate in Form 16F that the land or lease in question has been sold to him under the authority of this Act (which certificate shall, as provided by section 267, be registrable by the purchaser as if it were an instrument of dealing); and
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> (b) if deposited with the court pursuant to paragraph (b) of subsection (2) of section 258, the issue document of title to the land or, as the case may be, duplicate lease.

[11] The issuance of Borang 16F to the plaintiff under s 259(3) renders the defendant's argument that the plaintiff had breached the conditions in the proclamation of sale untenable. It is improbable that the court would have issued Borang 16F to the plaintiff if he had failed to pay monies into court in accordance with the proclamation of sale. The defendant's complaints are therefore without merit.

[12] Next, I turn to the second complaint raised by the defendant. It is premised on the allegation that the surplus monies have not been paid to her by MBSB in accordance with its obligation under s 268 of the National Land Code . It was said that MBSB was only entitled to deduct a sum of RM1,819,038.35 from the purchase price, and the balance ought to have been paid to her. That being her complaint, in my judgement, her remedy is to file an action against MBSB to declare the distribution of the proceeds of sale as being contrary to s 268 or to challenge the issuance of Borang 16F to the plaintiff.

[13] For ease of reference, I set out s 268:

(1) The purchase money arising on any sale under this Chapter shall be applied as follows:

(a) firstly, in the payment of rent to the State Authority or the lessor (according as the charge was a charge of land or of a lease) and, so far as no person other than the chargor was responsible therefor, any other outgoings payable to the State Authority or any local authority;

(b) secondly, in the payment of the expenses (as certified by the Registrar of the Court or Land Administrator, as the case may be) incurred in connection with the making and carrying into effect, of the order for sale;

(c) thirdly, in the payment to the chargee of the total amount due under the charge at the time of the sale;

(d) fourthly, in the case of a charge to secure the payment of an annuity or other periodic sum, in accordance with any provision for the satisfaction of payments subsequently falling due included therein pursuant to paragraph (b) of subsection (2) of section 242; and;

(e) fifthly, in the payment off of subsequently charges, if any, in the order of their priority.

(2) The reference in paragraph (e) of subsection (1) to the payment off of subsequent charges is a reference:

(a) in the case of a charge to secure the re-payment of a debt, or the payment of any sum other than a debt, to the payment to the chargee of the principal sum thereby secured (or much thereof as is then outstanding) together with any interest then due, if any:

(b) in the case of a charge to secure the payment of an annuity or other periodic sum, to the payment to the chargee of all sums then due, and the giving effect to any provision for the satisfaction of payments subsequently falling due included therein as mentioned in paragraph (d) of subsection (1).

(3) The residue, if any, of the purchase money shall, subject to subsection (3) of section 339, be paid to the chargor.

[14] The failure of MBSB as the chargee to apply the monies in accordance with s 268 does not confer on the defendant a cause of action against the plaintiff. The plaintiff is an innocent purchaser. This is clearly spelt out in s 269(1):

> (1) The receipt in writing of any officer of the Court or Land Administrator or in the case of a financial institution, chargee to whom any purchase money is paid on a sale under this Chapter shall be a sufficient discharge therefor to the purchaser; and the purchaser shall not be concerned to see to the application thereof, and shall not be liable for any loss occasioned by any failure to apply it in accordance with the provisions of section 268 or 268A.
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> (2) The sale of any lease under this Chapter shall not constitute a breach of any provision thereof, express or implied, restricting the right of the lessee to transfer the lease or otherwise part with the possession of the demised property.
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> (3) Notwithstanding anything contained in this Act or any other written law, the State Authority, any local authority, any chargor or purchaser who suffers any loss or damage by reason of any act, omission, neglect, error or default arising under this Chapter shall be entitled to such compensation as may be determined by the Court.

[15] The provisions cited above establish that the defendant is precluded from challenging the validity of the Borang 16F and the distribution of the proceeds of sale in these proceedings. Her remedy to recover the surplus monies lies against MBSB, and not the plaintiff.

CONCLUSION

[16] For the reasons given, I dismiss the application with costs of RM1,000 to the plaintiff.

Application dismissed.

Reported by Afiq Mohamad Noor